No. 80-1407

APR

In the Supreme Court of the United States

OCTOBER TERM, 1980

THOMAS M. WINTERS
and ELENA WINTERS,

Appellants,

v.

CITY OF KLAMATH FALLS,

Appellee.

On Appeal from the Supreme Court
of the State of Oregon

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does a State violate the Equal Protection Clause of the Fourteenth Amendment by providing in its laws for a different appellate review process for cases commenced in a municipal court than it provides for cases commenced in a state trial court?

2. Does the fact that a municipal police officer is usually responsible for enforcing both the laws of the state and the ordinances of the municipality, and is therefore usually in a position to charge a person with violating either a state law or a municipal ordinance, based on the same conduct, violate the Equal Protection Clause of the Fourteenth Amendment, if the procedure for commencing and prosecuting violations of both the ordinance and its statutory counterpart is not the same in all respects?

3. Does the fact that a city attorney might conceivably cause a person originally charged with violating a municipal ordinance to be prosecuted for a violation of state law instead, but did not do so on his own motion, violate the Equal Protection Clause of the Fourteenth Amendment, if the person charged with the municipal ordinance violation perceives the procedure governing the prosecution of state law violations more advantageous to him than the procedure governing the prosecution of municipal ordinance violations?

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Appellee, City of Klamath Falls, moves, pursuant to Rule 16, for an order dismissing the appeal in this case, on the ground that the appeal does not present a substantial federal question; and in the alternative, appellee moves for an affirmance of the judgment of the Supreme Court of the State of Oregon, on the ground that any federal question on which the decision below depends is so unsubstantial as not to need further argument.

OPINIONS BELOW

Appellants' statement is accepted.

JURISDICTION

Appellants' statement is accepted.

CONSTITUTIONAL PROVISIONS AND STATUTES

Appellants' statement is accepted.

STATEMENT OF THE CASE

Appellants' statement is accepted, with the additions noted immediately below, and in the argument which follows.

The facts stated in appellants' statement of the case are generally accurate; and on the whole, we do not quarrel with them, although we note that some of them appear to be outside the record of this case (*e.g.*, Jur. St. 7n.3).

Since appellants present "a brief overview of Oregon's system for prosecuting municipal offenses" at

pages 10-11 of their jurisdictional statement, we think it might be helpful, at this point, for us to supplement appellant's "overview" with a brief and, we hope, neutral summary of the historical development of the statutory provisions and case law upon which the present system rests, in order to correct any misimpressions appellants' description of that system might give to those unfamiliar with Oregon practice.

Originally, the state-court and municipal-court procedures of Oregon were more widely separated from each other than they may appear to be at present; and the prosecution of municipal ordinance violations throughout the state was invariably in the municipal court of the city in question. In 1971, however, the Oregon legislature provided for the abolition of the municipal court of the city of Portland, Oregon's largest city, and for the assumption of its functions by the district court for Multnomah County, the county in which Portland is almost entirely situated. Oregon Laws 1971, chapter 633. In 1973, primarily with reference to the situation in Multnomah County created by the 1971 legislature, Oregon Revised Statutes [ORS] 46.040 was amended by Oregon Laws 1973, chapter 645, to give district courts concurrent jurisdiction with municipal courts over city charter and ordinance violations.

At that time, since the district court was not a court of record, an appeal from a district court, like an

appeal from a municipal court then and now, was taken to the circuit court, which tried the matter de novo. And in one of the first municipal ordinance cases to reach the Oregon court of appeals which had originated in the district court for Multnomah County, the court of appeals held that when a district court sits as a municipal court, the court of appeals' review of the circuit court proceedings which follows is limited, like its review of municipal court prosecutions appealed to the circuit court and tried de novo, to the question of the constitutionality of the ordinance under which the proceedings were brought. *State v. Kingsley,* 19 Or. App. 379, 527 P.2d 744 (1974).

In 1975, however, the Oregon legislature made the district court throughout the state a court of record and, as part of the same law (Oregon Laws 1975, chapter 611), apparently in reaction to the *Kingsley* decision, and apparently still with the Portland/Multnomah County court system in mind, enacted ORS 46.047, which provides that:

> When an offense defined by municipal ordinance is tried in district court, it shall be subject to the same statutes and procedures that govern the trial and appeal of a like offense defined by a statute of this state.

Then, in *City of Portland v. Poindexter,* 38 Or. App. 551, 590 P.2d 781 (1979), the court of appeals held that, under this statute, direct appeals from municipal

ordinance cases tried in the Multnomah County district court are reviewable for any error of law apparent on the face of the record. And in 1980, the court of appeals held, in the present case, that as a matter of equal protection, it was likewise required to review circuit court trials de novo, upon appeals from municipal court, for any error of law apparent on the face of the record, notwithstanding ORS 221.360, which limits such appeals from the circuit court to the issue of the constitutionality of the charter provision or ordinance involved (*see* Jur. St. 46a). The Oregon supreme court reversed the decision of the court of appeals on this issue, and it is this ruling of the supreme court which appellants ask this Court to address.

ARGUMENT

This case presents no substantial federal question not previously decided by this Court.

We will not repeat here the analysis of appellants' arguments contained in the opinion of the Oregon supreme court in this case (*see* Jur. St. 11a-26a), although we submit that it is correct. We would add the following thereto.

In their jurisdictional statement, appellants do not challenge the well-settled rule that a state is not required, under the federal Constitution, to provide

for appellate review of trial court decisions, but contend that equal protection of the laws is necessarily denied by a statutory system which allows appellate court review of state court criminal cases for all errors of law apparent on the face of the record, but limits review of municipal court cases to a trial de novo, and to no further appeal, except for a challenge to the constitutionality of the charter provision or ordinance under which the case was brought.

Contrary to appellants' contention this Court has held, in this area as in others, that the mere fact that different, but equally constitutional procedures are followed in different kinds of cases does not rnder unconstitutional the procedure applied to either kind. *See, e.g., Mallett v. North Carolina,* 181 U.S. 589, 597-599 (1901); *Missouri v. Lewis,* 101 U.S. 23 (1879). *Cf. San Antonio School Dist. v. Rodriguez,* 411 U.S. 1 (1973).

It is not quite as uncommon as appellants assert in the course of their argument (Jur. St. 12-13, 18) for a state to provide no further appeal, or only limited appeal, from a case tried de novo in a court of general jurisdiction, upon appeal from a municipal, or other inferior court. *See, e.g., State v. Yabe,* 114 Ariz. [App.] 89, 559 P.2d 209, 210 & 212 (1977); *City of Las Vegas v. Carver,* 92 Nev. 198, 547 P.2d 688 (1976); *Hinkle v. City of Oklahoma City,* 559 P.2d 851 (Okla. Crim.

1977);[1] *Salt Lake City v. Granieri,* 16 Utah 2d 245, 398 P.2d 888, *appeal dismissed and cert. denied* 382 U.S. 23 (1965). *Cf. City of Shreveport v. Moore,* 219 La. 604, 53 So. 2d 783 (1971) (trial de novo in district court precludes further appeal otherwise available). We submit that under the previous decisions of this Court, such a limitation is not seriously open to question.

At pages 23-27 of their jurisdictional statement, appellants suggest that the Equal Protection Clause should be held to prohibit a state from giving municipal police officers discretion to charge persons with either a violation of state law or a violation of a municipal ordinance for the same conduct, and thereby determine the procedures under which the case will be tried and appealed. Since it is common practice throughout the country for municipal police officers to be charged with the responsibility of enforcing both the criminal law of their respective states and the municipal ordinances of their respective cities, it is difficult to see how this discretion can be withheld; nor, we submit, should it be withheld if the criminal justice system is to function at al. *Cf. United States v. Batchelder,* 442 U.S. 114 (1979).

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[1] As appellants suggest (Jur. St. 13), this decision was apparently abrogated by the enactment in 1978 of Oklahoma Statutes, tit. 11, §§ 27-132 and 28-128.

Finally, appellants argue that the Oregon statutes unconstitutionally confer upon prosecutors the unfettered discretion to charge a person with either a violation of state law or a violation of a municipal ordinance, based on the same conduct. Assuming that this argument is not completely answered by *United States v. Batchelder, supra,* we submit that appellants have not pointed to anything in the record of this case which would support a claim that the division of the prosecutorial function in Oregon between district attorneys, charged with the prosecution of crimes under state law, and city attorneys, charged with the prosecution of municipal ordinance violations, is arbitrarily disregarded. Nor have they pointed to anything which would support a claim that the Oregon statutory system for prosecuting municipal offenses — though arguably based, as our statement of the case indicates, upon some broadly-worded and awkwardly-meshing statutes — in fact results in the "court shopping" for tactical reasons about which they complain as a theoretical possibility. We submit that they did not, because they cannot.

CONCLUSION

For the above reasons, this appeal should be dismissed, or in the alternative, the judgment of the Supreme Court of the State of Oregon should be affirmed.

Respectfully submitted,

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